SERVED: August 30, 1996

NTSB Order No. EA-4479

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of August, 1996

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. THEODORE JOSEPH STEWART, Respondent.	Docket SE-14540

OPINION AND ORDER

The Administrator and the respondent have both appealed from the oral initial decision Administrative Law Judge William A. Pope, II, rendered in this proceeding on July 31, 1996, the day after the conclusion of an eight-day evidentiary hearing.[1] By that decision, the law judge affirmed, in part, an emergency order of the Administrator revoking all of respondent's airman certificates, including his Airline Transport Pilot ("ATP")

[1]An excerpt from the hearing transcript containing the 159-page initial decision is attached.

Certificate (No. 548063441), on the ground that he had violated sections 61.59(a)(1) and (2) of the Federal Aviation Regulations ("FAR," 14 CFR Part 61).[2] Specifically, the law judge concluded, based on an exhaustive review of the parties' evidence, that the respondent had not, as alleged, falsified documents in May 1993, reflecting that he had received an appropriate flight check for a type rating at the ATP level in a Grumman TBM aircraft, but that he had, in May 1979, purposefully misrepresented his record of flight time in applying for his ATP and flight instructor certificates.[3] On appeal, the Administrator challenges the dismissal of the one falsification charge and the respondent challenges the affirmation of the other one. For the reasons discussed below, we deny the Administrator's appeal and grant the

[2]FAR sections 61.59(a)(1) and (2) provide as follows:

> §61.59 **Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.**
>
> (a) No person may make or cause to be made--
> (1) Any fraudulent or intentionally false statement on any application for a certificate, rating, or duplicate thereof, issued under this part;
> (2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, or [sic] any certificate or rating under this part[.]

The law judge also affirmed the Administrator's allegation that respondent's violations of this regulation demonstrated that he lacked the good moral character required of an airline transport pilot certificate holder under FAR section 61.151(b).

[3]A copy of the Administrator's FIRST AMENDED EMERGENCY ORDER OF REVOCATION, which served as the complaint in the proceeding, is attached.

respondent's.[4]

This is not the first case that the Administrator has pursued against the respondent for suspected improprieties in connection with either his acquisition or conferral of type ratings in vintage World War II aircraft. In the last round, in which, essentially, fraud was alleged with regard to two ratings respondent had received and to one he had given, the Board sustained the law judge's dismissal of all charges against the respondent, who is a full-time captain for American Airlines and, until that action was brought, had also been a designated pilot examiner for the Administrator.[5] See Administrator v. Stewart, NTSB Order No. EA-4387 (served July 28, 1995). We there observed (id. at 2):

> The charges in this proceeding resulted from a nationwide investigation by the Administrator into suspected "type rating trading" by and among ATP certificate holders who are authorized by the FAA either by the scope of their employment or by delegation to issue such ratings to others. The Administrator's suspicion, as best we can discern it from the record in this case, is that some FAA inspectors and some designated pilot examiners (DPE) have been issuing each other type ratings for various aircraft without requiring an adequate or proper demonstration of knowledge and proficiency for the so-called "add-on" ratings.

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[4]The National Transportation Safety Board Bar Association and the Experimental Aircraft Association have sought leave to file a one-week late *amicus curiae* brief in support of the respondent's appeal. The request, opposed by the Administrator, is denied, as no cause for the delay in submitting a timely filing has been identified. See Section 821.9(b) of the Board's Rules of Practice, 49 CFR Part 821.

[5]Respondent's involvement with these "warbirds" is in furtherance of his interest in the aircraft as a hobby. Obtaining type ratings to fly them enables him to assist their owners in transporting them to airshows.

The Administrator's loss in the earlier case appears to have prompted further investigation of respondent to embrace matters far beyond the scope of the *bona fides* of the type ratings respondent has had added to his ATP or has approved for issuance to others. We turn first to the Administrator's appeal from his second defeat in his attempt to show that respondent has received a type rating to which he is not entitled.[6]

In his June 26, 1996 First Amended Emergency Order of Revocation, the Administrator sought, inter alia, to establish, with respect to the falsification charge dismissed by the law judge, that the respondent could not have met the requirements for a type rating at the ATP level in the G-TBM (N5260V) he used for the flight check because that aircraft did not have a glide slope, which is needed to satisfy the ILS approach component of the required demonstration of instrument competency. In response to this allegation, the respondent and three of his witnesses testified to the effect that the required instrument procedure could be, and was, accomplished in the aircraft because it had been outfitted with the temporary installation of a Narco Nav 122

[6]The Board, of course, is not authorized to review the Administrator's exercise of his power to take emergency certificate action. See, e.g., Administrator v. Correa, NTSB Order No. EA-3815, at 3 (1993). We are constrained to register in this matter, however, our opinion that where, as here, no legitimate reason is cited or appears for not consolidating all alleged violations into one proceeding, subjecting an airman in the space of a year to two emergency revocations, and thus to the financial and other burdens associated with an additional 60-day grounding without prior notice and hearing, constitutes an abusive and unprincipled discharge of an extraordinary power.

radio, a self-contained unit that possesses, among other features, a glide slope. The Administrator maintains that the law judge erred in crediting this testimony because, in the Administrator's view, it cannot be reconciled with the absence of any maintenance record entries in the aircraft's logbook to reflect the impermanent radio set ups respondent and others claimed had been utilized on different occasions. We find no error.

Assuming, for purposes of argument, that maintenance entries were required for a makeshift installation such as respondent described, it does not follow that the law judge's credibility assessments should be disturbed, for while the lack of entries relating to a provisional piece of radio equipment might bear on the issue of credibility, such a recordkeeping deficiency would not preclude the law judge from concluding that the respondent and his witnesses were nevertheless telling the truth about the employment of a Narco unit for respondent's check ride. The Administrator's evidence concerning the regulatory necessity for maintenance entries obviously did not establish that a unit could not be installed without the proper paperwork having been accomplished. Consequently, and contrary to the Administrator's suggestion that the law judge did not appreciate the significance of the maintenance record evidence, the respondent's account cannot be said to be inherently incredible, and the law judge's acceptance of it cannot be said to be clearly erroneous. At most, the Administrator identified a reason for not believing

respondent; he did not identify a reason for finding the respondent's testimony unbelievable.

The law judge reached a different conclusion concerning respondent's credibility on the falsification charge based on flight time claims made on certain airman certificate applications submitted to FAA designated pilot examiners in 1979. Basically, the complaint alleges that the applications respondent tendered in March and May of that year revealed, among other flight time discrepancies, an increase of nearly 1,500 hours in total pilot in command time in a two-month period, an amount respondent readily concedes could not be accurate.[7]

The law judge, albeit sensitive to the possibility that the passage of time may have adversely affected respondent's ability to gather evidence in support of his position that he had not knowingly entered any false flight hour numbers, determined that respondent had not demonstrated that the lapse of time had actually prejudiced him. The law judge observed that respondent alone was responsible for the admittedly erroneous entries, he had not offered any exonerating explanation which could be corroborated, and the law judge simply did not believe respondent's disavowal of any recollection of how the excessive disparities could have occurred.

In this latter connection, the law judge reasoned, reasonably, we think, that given the importance to an airman bent

[7]The Administrator did not allege that respondent at the time of his May 1979 applications had not accumulated the minimum number of hours necessary to obtain an ATP certificate.

on an airline career of obtaining an airline transport pilot certificate, he would not likely forget the circumstances surrounding his initial disapproval and subsequent success in achieving that goal. For all of these reasons the law judge was unpersuaded that respondent's inability to locate any records or individuals that might be able to explain how the applications were filled out could be found to establish prejudice. Nothing in respondent's appeal brief convinces us that the law judge erred in his judgment on the issue of prejudice or that he could not, on this record, conclude, as a matter of credibility, that the respondent was dissembling when he denied knowing why the entries in the May applications grossly inflated his flight time relative to the March application.

Notwithstanding our concurrence that the law judge's negative credibility finding against respondent concerning the applications supports a conclusion that the respondent knew the entries were false when he made them, we decline to affirm the intentional falsification charge the law judge sustained. We think that even if the law judge correctly evaluated the evidence, and the respondent, as alleged, intentionally falsified airman applications in 1979, the commission of such an offense so long ago cannot reasonably be employed now to make a valid assessment of the respondent's current *nontechnical* qualifications to retain his airman certificates.

We appreciate, and our procedural rules recognize,[8] that the

[8]See Section 821.33 of the Board's Rules of Practice.

Administrator should have the discretion, in the interest of air safety, to pursue even stale charges that implicate airman qualifications. We nevertheless believe that judgments concerning qualifications that certain conduct would ordinarily warrant become less and less justifiable as the interval between the conduct and the prosecution for it increases. While we do not believe it necessary in this proceeding to attempt to determine the maximum interval we would accept as consistent with a proper concern for contemporaneity, we are satisfied that the limit has been exceeded here. In sum, we hold that the respondent's unblemished career in the more than 17 years that have elapsed since the complained of violations and his present "reputation for truth and veracity" (see I.D. at p. 1800) tip the scales against reliance on the dated indicator of his care, judgment, and responsibility as a certificate holder that the Administrator would have us employ to endorse his insistence on revocation for charges he appears to have no excuse for not bringing many years sooner.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied;

2. The respondent's appeal is granted;

3. The initial decision is affirmed in part and reversed in part; and

4. The Administrator's First Amended Emergency Order of Revocation is reversed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.